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No. 91-1721

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE FLORIDA and ED AUSTIN, in his official capacity as Mayor of the City of Jacksonville,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. AS AMICUS CURIAE SUPPORTING APPELLEE

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QUESTION PRESENTED FOR REVIEW

Whether an association challenging a racially exclusive government ordinance may establish standing by showing that its members are precluded from bidding on certain municipal contracts, or whether the association must show that its members actually would have received one or more of those contracts absent the set-aside provisions?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS 1

STATEMENT 3

SUMMARY OF ARGUMENT 4

ARGUMENT

I Petitioner's Members Suffered an Injury-In-Fact Sufficient to Confer Standing, When They Suffered Exclusion From The Opportunity To Compete For City Contracts. 4

II Favorable Inferences Drawn from Petitioner's Allegations Establish Financial Harm to The Petitioner's Members. 9

III Petitioner Has Met Its Burden of Proof 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases — Page

Allen v. Wright, 468 U.S. 737 (1984) 6

Babbitt v. Farm Workers, 442 U.S. 289 (1979) 7

Capeletti Brothers, Inc., et. al. v. Broward County, 738 F.Supp. 1415 (S.D. Fla. 1990), *aff'd*, 931 F.2d 903 (11th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 2871, 115 L.Ed.2d 1037 (1991). . . 5

City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989). 8

Cone v. Fla. Dept. of Transportation, 921 F.2d 1190 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2238 (1991). 5, 6, 8

Coral Constr. Co. v. King County, 941 F.2d 910, 930 (9th Cir.), *cert. denied*, ___ U.S. ___ 112 S.Ct. 875 (1992). 6

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979). *11*

Hunter v. Erickson, 393 U.S. 385 (1969) 8

International Brotherhood of Teamsters v. United States, *431 U.S. 324 (1977)*. *8*

Lucas v. South Carolina Coastal Council, ___ U.S. ___, 60 U.S.L.W. 4842, 1992 Westlaw 142517(1992). 12

Lujan v. Defenders of Wildlife, ____ U.S. ___, 112 S.Ct. 2130 (1992) 12

Northeastern Florida Chapter v. City of Jacksonville, 951 F.2d 1217 (11th Cir. 1992) 4, 5, 9

Pennell v. City of San Jose, 485 U.S. 1 (1988). . 6, 10

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 8

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, (1976) 10

Warth v. Seldin, 422 U.S. 490, 501 (1975). . 6, 7, 10

Wygant v. Bd. of Education, 476 U.S. 267 (1986) . . 8

Constitution of the United States

Article III 7, 10

Ordinances

City of Jacksonville Purchasing Code, §126.603 . . . 10

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The Associated General Contractors of America, Inc., with the written consent of the parties, respectfully submits this brief as Amicus Curiae in support of the petitioner. The letters of consent have been filed separately herewith.

INTEREST OF THE AMICUS

The Associated General Contractors of America, Inc. ("AGC") is a private, non-profit trade association founded in 1918 to represent the national interests of general construction contractors. Approximately 8,000 of the leading firms engaged in general contracting are among the association's approximately 33,000 members. Among other things, these firms construct highways, bridges, buildings, industrial facilities, and municipal utilities.

AGC has 100 state and local chapters throughout the United States, with at least one chapter serving each state, and one chapter in Puerto Rico. The Petitioner is one of five AGC chapters in the State of Florida, and one of seven AGC chapters within the jurisdiction of the U.S. Court of Appeals for the Eleventh Circuit.

AGC members have a great and interest in government contracting policies and procedures. When necessary, AGC and its chapters turn to the courts for assistance with related issues. Other AGC chapters have brought cases similar to this one, including *Michigan Roadbuilders Ass'n, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 109 S.Ct. 1333 (1989) and *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987). AGC has most recently participated in this Court's proceedings as amicus curiae in *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island*, Nos. 91-261 and 91-274.

AGC's longstanding policy is to provide support for open competitive bidding for public construction contracts. The purposes of competitive bidding and AGC's related policy, are "to give all persons equal rights to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition." *United States v. Brookridge Farm*, 111 F.2d 461, 463 (10th Cir. 1940).

AGC is concerned that the Eleventh Circuit's narrow rule, that a contractor must lose a specific contract before he or she can invoke the federal courts' jurisdiction over racially exclusionary criteria would encourage the excessive resort to such criteria. This case impinges on one of the deepest concerns of an industry burdened by a resurgence of racial classifications over the last decade.

STATEMENT

Amicus Curiae adopts the Statement of the Case as set forth in the Brief of Petitioner.

Additional references are made to portions of the record showing that the allegations supporting standing were before the court in Plaintiff's "Statement of Material Facts on Which There is No Genuine Issue" (R2-38-Par. 3-8), and that prior to enactment of the challenged ordinances minority-owned firms were receiving less than the amount set aside for minority participation.

SUMMARY OF ARGUMENT

The Amicus agrees with the Petitioner's position that the record is sufficient to demonstrate injury in fact. The court has been particularly clear that economic injury is not required in cases involving governmental classifications on the basis of race.

Petitioner has also satisfied the requirement that it show a realistic danger that its members do sustain a direct monetary injury as a result of the application of the challenged law.

In concluding that the Petition had not shown a likelihood of monetary harm the court failed to give Petitioner the inferences from its well-pleaded allegations.

ARGUMENT I

Petitioner's Members Suffered An Injury-In-Fact, Sufficient to Confer Standing, When They Suffered Exclusion From the Opportunity To Compete For City Contracts.

The Eleventh Circuit has adopted an excessively rigid and narrow rule that permits an individual excluded from competition for public contracts to challenge the basis for the exclusion only if he or she "would have bid more successfully on any one or more of [the] contracts." *Northeastern Florida Chapter v. City of Jacksonville*, 951 F.2d 1217, 1219 (11th Cir. 1992).

Citing its prior decision in *Cone v. Fla. Dept. of Transportation*, 921 F.2d 1190 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2238 (1991), the Eleventh Circuit held that the Petitioner lacked standing to challenge Jacksonville's practice of setting aside prime construction contracts, explaining:

> We are barred [from a decision on the merits of this case] by the decision in *Cone*, where a challenge by non-minorities to a set-aside program similar in operation to Jacksonville's was rejected for lack of standing because plaintiffs did not allege any specific contract lost on account of race. 921 F.2d at 1205-06; *accord Capeletti Brothers, Inc., et. al. v. Broward County*, 738 F.Supp. 1415, 1417 (S.D. Fla. 1990) (plaintiff failed to specify particular project by which it suffered injury), *aff'd*, 931 F.2d 903 (11th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 2871, 115 L.Ed.2d 1037 (1991).

Northeastern Florida, 951 F.2d at 1219.

In *Cone*, the plaintiffs had challenged a Florida statute requiring "not less than 10 percent of the amounts expended from the State Transportation Trust Fund" to be expended "with small business concerns owned and controlled by socially and economically disadvantaged individuals," except "to the extent that the [Secretary of Transportation] determines otherwise. . . " 921 F.2d at 1200. Ultimately, the Eleventh Circuit found that the plaintiffs had failed to establish facts "from which the court could predict whether the Secretary would deny them equal

protection of the law in awarding future highway construction contracts," 921 F.2d at 1207, noting that evidence of contracts lost in the past or future would have satisfied this requirement. 921 F.2d 1205, n.49.

The Eleventh Circuit's position was derived from dicta in an earlier case in which the Ninth Circuit had found standing but not before questioning "whether [plaintiff] has alleged a more certain injury than a potential lost bid." See *Coral Constr. Co. v. King County*, 941 F.2d 910, 930 (9th Cir.), cert. denied, ___U.S. ___112 S.Ct. 875 (1992). *Cone* also cited a line of cases in which a disappointed bidder was held to have standing to challenge the award of a government contract to another firm. 921 F.2d at 1205, n. 49.

This Court has, however, held that a plaintiff can establish standing to mount a facial challenge to an ordinance by showing that the ordinance will be enforced against the plaintiff and pose a realistic danger of direct injury, traceable to the ordinance. *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988).

Writing for the *Pennell* Court, the Chief Justice observed that "application of the constitutional standing requirement [is not] a mechanical exercise." *Id.* at 7, citing *Allen v. Wright*, 468 U.S. 737, 751 (1984). The Chief Justice added that when standing is challenged on the basis of pleadings, this court will "accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party." *Id.* at 7, citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The Court held that the threat of enforcement to the disadvantage of the plaintiff association's members was "a sufficient threat

of actual injury to satisfy Article III's requirement that '[a] plaintiff...demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* at 7-8, citing *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979).

Here, the Association has alleged that a city ordinance had excluded its members from competition for public contracts on the basis of race. Whether considered economic or non-economic, that competitive injury was a "demonstrable, particularized injury" to the plaintiff so that the plaintiff "w[ill] benefit in a tangible way" from court action. *Warth*, 422 U.S. at 508. This was sufficient injury-in-fact. Had the Court of Appeals construed the complaint in favor of the complaining party, it would have also found a "realistic danger" of direct injury resulting from the statute's operation or enforcement.

Babbitt, 442 U.S. at 299, involved election procedures that were alleged to burden freedom of Association. This Court held that it was not necessary for the plaintiffs to invoke those procedures in order to establish standing. The argument that this Court rejected was much like the argument that the Eleventh Circuit has made -- that delaying adjudication until the plaintiffs invoke the challenged procedures might mean a better factual record. 442 U.S. at 300. This Court held that "awaiting appellees' participation in an election would not assist our resolution of the threshold question whether the election procedures are subject to scrutiny under the First Amendment at all." *Id.* 442 U.S. at 301.

Under these circumstances, the Petitioner's claim that the uncontested allegations of its complaint were

sufficient to establish an injury-in-fact is extremely well-founded. Petitioner has cited the other relevant authorities and has briefed them well. AGC will pause, at this point, only to underscore the equal protection context in which this case arises. Numerous decisions of this Court have been that standing to mount an equal protection challenge to government laws or policies based on race does not require economic injury. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (plaintiff need not show admission but for the discriminatory program); *Hunter v. Erickson*, 393 U.S. 385 (1969) (plaintiff need now show discrimination precluded actually buying property); *Wygant v. Bd. of Education*, 476 U.S. 267 (1986) (teacher made no showing she would have kept the job but for preference programs). *cf. International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977) (futile application for employment unnecessary.)

The ruling in *Cone*, may well be tested again in this case. The City of Jacksonville has repealed the ordinance enjoined here by the district court and replaced it with one that gives city officials a wide discretion of preferential methods to employ, including "set-asides." City officials may be expected to cite *Cone* in defending the new law. Presumably the Petitioner will argue in a facial challenge that the factual predicate for the revised ordinance is inadequate to justify a program of racial preferences, or in the alternative that the program is not narrowly tailored to redress identified discrimination. See *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

Nevertheless, the *Cone* decision and its progeny, *supra* at 5, including the decision below, establish a very difficult test for standing in all equal protection cases and

perhaps all other cases in that circuit. In this equal protection case, where the contracts (1) were reserved exclusively for those who met the city's racial criteria, and (2) there was no showing of a remedial purpose, it was reversible error for the Eleventh Circuit to adopt the mechanical test of showing a lost contract as an essential element of standing.

ARGUMENT II

Favorable Inferences Drawn From Petitioner's Allegations Establish Financial Harm To The Petitioner's Members.

The favorable inferences that the Eleventh Circuit was required to draw from the Petitioner's uncontested allegations also established a realistic danger that member firms have suffered financial harm that can be directly traced to the challenged ordinance. The complaint leaves no realistic doubt that Petitioner's members would have been successful in bidding for contracts that the city had set aside, had these firms been permitted to bid.

The city set aside $14 million in public construction contracts under the challenged ordinance. *Northeastern Florida*, 951 F.2d at 1219. Petitioner is a trade association of 240 contractors, subcontractors, suppliers, and associates who regularly bid on and perform public construction contracts for the city. *Id.* at 1218. Ten per cent of the city's contracts were set aside for the members of certain racial groups precisely because, in spite of open competi-

tion in the past, less than that percentage of the city's contracts had gone to firms owned by members of those groups, (including "Spanish-speaking Americans," Eskimos and Aleuts.) Jacksonville Purchasing Code, § 126.603. The city submitted an affidavit from a city official that the program had increased minority participation in city contracting "by dollar volume." See Haskell affidavit ("RI-13-22). The only logical inference from these facts is that if a set-aside increases participation by the preferred businesses, it must decrease participation by Petitioner's members who are not the beneficiaries of the preference.

The Court of Appeals cited no record evidence that would support the conclusion that the association's members would not have been successful in open competition for "one or more" of the contracts that the city had set aside. For the court to imagine a scenario in which no non-minority firms would have been the low bidder for any of several million dollars a year in competitive bids is to fail to "construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490 (1975). Such a conclusion is "purely speculation." See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42 n.23 (1976). The certainty of enforcement and "the concomitant probability" of a lost contract were sufficient to satisfy Article III. *Pennell*, 485 U.S. 1, 8.

ARGUMENT III

Petitioner Met Its Burden of Proof.

The pleadings in support of standing were sufficient and it was incumbent upon the City to contest the facts at trial. On remand, the city opted to stand on the record it had made and not go to trial. Nevertheless, the Court of Appeals treated the allegations of injury as if they had been subject to proof after having been put into issue.

While there were cross-motions for summary judgment there was no challenge to standing. The facts regarding standing were not only in the complaint but were presented to the court in "Plaintiff's Statement of Material Facts on Which There is No Genuine Issue" (R2-38-Par. 3-8.)

This is not a case in which the reviewing court had evidence which bore on the question of standing, over and above what was in the compliant. See, e.g., *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109, n. 22 (1979). Defendant's motion for summary judgment did not raise that question.

In *Gladstone Realtors*, this Court considered the issue of standing. After reviewing the record, the Court concluded:

> [T]he facts alleged in the complaints and revealed by initial discovery are sufficient to provide standing under Art. III. It remains open to petitioners, of course, to contest these facts at trial.

Id., 441 U.S. at 115.

This Court recently addressed the issue in *Lujan v. Defenders of Wildlife*, _____ U.S. ___, 112 S.Ct. 2130 (1992), where the Court held that plaintiffs had failed to prove sufficient injury-in-fact from environmental harms occurring outside the United States. The Court made a significant distinction between the proof required at the pleading stage of a case and that required to defeat a motion for summary judgment. The Court reiterated that at the pleading stage, general factual allegations may suffice. *Id.*, 112 S.Ct. at 2137

The significance of this distinction came into full view in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886 (1992). In that case, the plaintiff claimed that a state statute diminished the value of his property in violation of Takings Clause. The Court held that the plaintiff had alleged sufficient injury to sustain standing because the South Carolina court had foreclosed further pleading in regard to the damage claim. This Court addressed the question of standing "as if the case were here on the pleadings alone." *Lucas*, 112 S. Ct. at 2892, n.3. The Court stated that *Lujan*, by contrast, involved a motion for summary judgment requiring "specific facts to be adduced by sworn testimony." *Id.* If the *Lujan* Respondent had challenged the generalized allegations of injury-in-fact at the pleading stage, the challenge "would have been unsuccessful." *Id.*

AGC suggests that in a case such as this, where (1) standing is not contested on motion for summary judgment and (2) there is no other evidence in the record that challenges the plaintiff's allegation of standing, the issue should be reviewed as if the case were before the court on

the pleadings. On that basis, it is more than clear that the Petitioner met its burden of proof.

CONCLUSION

For the foregoing reasons the decision of the Court of Appeals should be reversed and the case remanded for further proceedings by the district court.

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